IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 16, 2006

STATE OF TENNESSEE v. DARRELL DEWAYNE ARMOUR

Direct Appeal from the Criminal Court for Hamilton County
No. 241423 Douglas A. Meyer, Judge

No. E2005-01242-CCA-R3-CD - Filed August 30, 2006

A Hamilton County Criminal Court jury convicted the appellant, Darrell Dewayne Armour, of rape and incest, and the trial court sentenced him to concurrent sentences of ten and six years, respectively. In this appeal, the appellant claims (1) that the trial court erred by admitting "fresh complaint" evidence; (2) that the trial court erred by allowing the State to say during its opening statement that the appellant refused to speak with a detective during his investigation; (3) that the State improperly allowed a prospective juror to make favorable comments about two State witnesses during voir dire; (4) that the trial court improperly allowed a nurse to testify about the victim's medical records; (5) that the State violated State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), when a police detective lost his investigative notes; and (6) that the trial court erred by refusing to apply mitigating factors to the appellant's sentences. Upon review of the records and the parties' briefs, we affirm the appellant's convictions and the length of his sentences. However, because the judgment of conviction for rape does not reflect that the appellant must serve one hundred percent of that sentence, we remand the case for entry of a corrected judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed and Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Ardena J. Garth and Donna Robinson Miller, Chattanooga, Tennessee, for the appellant, Darrell Dewayne Armour.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; William H. Cox, III, District Attorney General; and Rodney Strong and Mary Sullivan Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On the night of April 14, 2002, the appellant raped his sixteen-year-old niece. At trial, the then eighteen-year-old victim testified that in April 2002, she lived with her grandmother, Barbara Robinson, at 1902 Sharp Street in Chattanooga. The appellant; the appellant's son; the victim's disabled great-grandfather; and the victim's cousin, Dexter Smith, also lived in the three-bedroom house. The victim's father lived nearby, but the victim did not live with him because he was never home.

On Sunday, April 14, 2002, the victim spent much of the day walking around the neighborhood while the appellant, Dexter Smith, and the appellant's friend, Robert Brown, sat on the porch and drank beer. The victim's grandmother was home, and the victim's great-grandfather was home but stayed in his bedroom. The victim stated that her grandmother left the home about 9:00 p.m. The appellant came into the victim's bedroom and asked her if she was going to attend and play softball at college. The victim said yes, and the appellant left the room. The victim went into the kitchen to iron her clothes for school the next day and returned to her bedroom. The appellant came into the room and said, "I know somebody want to see your body for $100." The appellant left the room, and the victim went into the kitchen to get a drink. She then went into the front room of the home and watched television. Dexter Smith also was in the front room but was asleep on the couch. The victim returned to her bedroom, and the appellant came into the room, shut the door, grabbed the victim by her neck, forced her onto the bed, and put his right hand over her mouth. The victim was wearing a skirt and started kicking her legs, but the appellant took off her panties with his left hand, pulled down his pants, and put his penis in her vagina for five or ten minutes. The appellant did not wear a condom and ejaculated inside the victim. He told the victim not to tell her father or her aunt about the incident, smiled at the victim, pulled up his pants, and went into the bathroom.

The victim testified that the appellant's son and infant daughter had been in the appellant's bedroom during the rape. After the rape, the appellant took his daughter to her mother's home, and the victim took a shower. The victim was scared and could not sleep. She got up about 5:45 a.m. and left for school. Everyone in the house was asleep, and the victim did not speak to anyone. She walked to her bus stop, and the bus picked her up about 6:30 a.m. When the bus driver saw the victim, she asked the victim, "What's wrong with you?" The victim said, "Nothing," and the driver said, "Something is wrong with you." When they got to school, the victim remained on the bus and told the driver that her uncle had "sexed" her. The bus driver told the victim that the victim had until 7:00 p.m. to tell the victim's father. The victim testified that she had been scared to tell anyone about the rape because she did not know what the appellant would do to her. She also stated, "I just didn't know what to do. My mind was just gone. . . . I was in shock."

The victim played in a softball game after school, and the victim's father attended the game. While the victim's father was driving her back to her grandmother's house, the victim told her father that she did not want to return to her grandmother's home and that the appellant had had sex with her. The victim's father was angry and drove her to her great-aunt's home. The victim's great-aunt telephoned 911 and reported the rape. When the police arrived, the victim's father took the victim to the Sexual Assault Crisis and Resource Center, where a nurse examined the victim and gave her

an injection. After the exam, the victim's great-aunt took the victim to Barbara Robinson's house in order for the victim to get her clothes. The victim's grandmother and Dexter Smith were on the porch, but the victim did not see the appellant. The victim spent the night at her cousin's house. The next day, the victim went to her pediatrician because she had been vomiting.

On cross-examination, the victim acknowledged that she did not telephone her father on April 15 and went to school. She said that her bedroom door had been broken at the time of the rape and would not stay closed but that the appellant held the door closed with his feet. The appellant never threatened to harm the victim physically but threatened to tell her father that she had been smoking marijuana if she told her father about the rape. The victim stated that the appellant's threat did not scare her because she had never smoked marijuana. After the rape, the victim took off her clothes and put them in the dirty clothes pile. The victim's grandmother told the victim that she washed the clothes, and the clothes were never returned to the victim. The victim acknowledged that she waited twenty hours to notify the police about the rape, and she said that she did not tell anyone in the house about the rape because she did not think anyone would believe her. The victim acknowledged that at the appellant's preliminary hearing, she testified that the rape lasted thirty or forty minutes and did not testify that the appellant had grabbed her by the neck.

Markita Watkins testified that she drove the victim's school bus and knew the appellant and the victim's father. On April 15, 2002, Watkins picked up the victim at the bus stop. The victim got on the bus and was very quiet, which was unusual, and Watkins asked the victim what was wrong. When they got to school, the victim stayed on the bus to talk with Watkins and "had tears in her eyes like something was bothering her." The victim told Watkins that the appellant "stuck his thing in me." Watkins told the victim that she was going to telephone the victim's father, but the victim told Watkins that she would tell him. Watkins said that the victim was scared and that she gave the victim until 7:00 p.m. to tell her father about the rape. On cross-examination, Watkins testified that the police never questioned her.

Anthony Armour, the victim's father and the appellant's brother, testified that on April 15, 2002, the victim told him that the appellant had raped her. Armour drove the victim to his aunt's home, and Armour's aunt telephoned the police. After the police arrived, Armour drove the victim to the Sexual Assault Crisis and Resource Center, and a nurse examined the victim. Detective Vernon Kimbrough arrived at the Center and took the victim's statement. The victim went home with Armour and stayed awake all night, crying and vomiting. Armour testified that on April 15, he had telephoned the appellant throughout the day because the appellant was supposed to cut his hair. Although the appellant usually returned Armour's calls, the appellant did not return Armour's calls on April 15.

JoAnn Hopkins, the victim's great-aunt, testified that on April 15, 2002, the victim's father telephoned, sounded nervous, and said, "I'm coming to get you." Hopkins went outside and waited for Anthony Armour and the victim. When they arrived, Armour and the victim were crying, and Hopkins telephoned 911. The police came to Hopkins' home, and Hopkins went with the victim to the Sexual Assault Crisis and Resource Center, where a nurse examined the victim. Hopkins then

went with the victim to Barbara Robinson's house to get the victim's clothes. Later that night, the appellant telephoned Hopkins and told her that he did not rape the victim. Hopkins told the appellant that he could prove his innocence by giving a blood sample, but the appellant refused because someone was trying to "railroad" him. The appellant told Hopkins that "if he went down, [Anthony Armour] was going down with him." The next day, the victim was sore, and her vagina was swollen. On cross-examination, Hopkins testified that she could not remember where the victim spent the night on April 15.

Detective Vernon Kimbrough of the Chattanooga Police Department testified that on April 15, 2002, he learned about a rape at 1902 Sharp Street. Detective Kimbrough met the victim at the Sexual Assault Crisis and Resource Center and took her statement. The victim told Detective Kimbrough that the appellant had raped her in her bedroom the previous day. According to the victim, the appellant had been drinking alcohol, grabbed her by the neck, put his hand over her mouth, closed the door with his feet, took off her clothes, pulled his pants down, and vaginally raped her. A nurse examined the victim and collected evidence for a rape kit. Detective Kimbrough went to Barbara Robinson's home and informed her about the rape. Robinson was upset but allowed Detective Kimbrough to collect evidence, and Detective Kimbrough took photographs and collected the victim's bedspread. While Detective Kimbrough was at Robinson's home, Robinson telephoned the appellant, and Detective Kimbrough spoke with him over the phone. Detective Kimbrough told the appellant that he needed to speak with him about a rape. While Detective Kimbrough was still at the home, Anthony Armour called Detective Kimbrough and told him that the appellant was on Raulston Street. Detective Kimbrough drove to Raulston Street, saw three individuals, and asked them if they knew Darrell Armour. They said no, and Detective Kimbrough returned to the police department. He found a picture of the appellant and realized that the appellant had been one of the three individuals. The appellant would not come to the police department to speak with Detective Kimbrough, so the detective had warrants issued for his arrest. Another detective arrested the appellant on April 18, 2002.

On cross-examination, Detective Kimbrough testified that he sent the victim's rape kit, the victim's blood sample, and the appellant's blood sample to the Tennessee Bureau of Investigation (TBI) for testing. Detective Kimbrough did not interview Markita Watkins or anyone who had been in the house at the time of the rape. Detective Kimbrough did not see any physical injuries on the victim and did not see any injuries on her neck.

Ardyce Rodolpho, a registered nurse at the Sexual Assault Crisis and Resource Center, testified regarding the victim's medical records. She stated that nurse Kat King examined the victim on April 15, 2002, at 8:00 p.m. According to the victim's medical evaluation form, the victim was raped at 11:30 p.m. on April 14. Nurse King found motile sperm in the victim, and Rodolpho testified that sperm could live in the vagina for three to four hours and in the cervix for seven days. King also found abrasions in the victim's vagina, which indicated a forceful penetration. Rodolpho testified that vaginal injuries usually healed quickly because of the vagina's abundant blood supply but that the victim's having abrasions twenty hours after the rape indicated the vaginal penetration was forceful and more serious. After the victim's physical exam, nurse King gave the victim birth

control pills to prevent pregnancy and three antibiotics to prevent sexually transmitted diseases and infection. On April 15, the victim went to her pediatrician because she had been vomiting and having stomach pain. According to the pediatrician's records, the victim's abdomen from her belly button to her private area was tender, which is common after a forcible rape. On cross-examination, Rodolpho testified that according to the victim's medical records, the victim did not complain to nurse King about pain and did not tell King that the appellant had grabbed her by the neck. The records also showed that King did not collect the victim's underwear for the rape kit and that King described the victim's vaginal abrasions as "slight."

Special Agent Forensic Scientist Charles Hardy of the TBI Crime Laboratory testified that he received the victim's rape kit, the victim's blood sample, and the appellant's blood sample. Agent Hardy observed sperm on the victim's vaginal swabs and extracted DNA from the sperm. He also extracted DNA from the victim's and the appellant's blood samples and obtained their DNA profiles. Agent Hardy compared the DNA from the sperm to the DNA from the appellant's blood and concluded that the DNA profiles matched. He said that the probability of another person having the appellant's DNA profile exceeded 6.4 billion.

Dexter Smith, the appellant's cousin, testified for the appellant that he was at Barbara Robinson's house on April 14, 2002, and that he and the appellant cut grass that morning. After cutting grass, Smith drank two twelve-ounce beers. Smith did not know if the appellant drank beer because the appellant and Robert Brown stayed in the appellant's bedroom all afternoon. About midnight, Brown left the home, and the appellant took his infant daughter to her mother's house. Smith did not hear any fights that night and did not hear anyone scream or slam doors. After the appellant left the home, Smith saw the victim come out of the bathroom. The police never questioned Smith. On cross-examination, Smith testified that Barbara Robinson also drank beer on April 14. On April 15, Detective Kimbrough arrived at Robinson's home but did not speak with Smith. Later, Smith asked the appellant if he had raped the victim, and the appellant said no. Smith denied telling his sister and her daughter that he did not know anything about what happened on the night of April 14 because he had been drunk and passed out on the couch.

Barbara Ann Robinson, the victim's grandmother and the appellant's mother, testified that in April 2002, her father, the appellant, the appellant's son, the victim, and Dexter Smith lived with her. On April 14, 2002, friends and relatives visited Robinson's home all day, and Robinson's mother arrived that afternoon. About midnight, the victim was asleep in bed, and Robinson left in order to take Robinson's mother home. When Robinson returned, she checked on the victim, and the victim was still asleep. The next morning, Robinson got up about 5:00 or 6:00 a.m., and the victim got up about 5:00 or 5:30 a.m. The victim walked to the front room of the house and told Robinson, "Grandmama, I see you later, I'm gone to school." The victim did not appear to be upset, and Robinson did not wash clothes that day. On cross-examination, Robinson testified that she did not drink beer on April 14. The appellant and Robert Brown stayed in the appellant's bedroom on April 14, and she did not know if they drank beer. When she returned home in the early morning hours of April 15, the appellant was not there, and everyone in the house was asleep. Robinson

never saw the appellant go into the victim's bedroom. The jury convicted the appellant of rape, a Class B felony, and incest, a Class C felony.

II. Analysis

The appellant contends that the trial court erred by admitting "fresh complaint" evidence. Specifically, he contends that the testimony of Markita Watkins, Anthony Armour, and Detective Kimbrough regarding what the victim told them about the rape is inadmissible hearsay. He also contends that JoAnn Hopkins' 911 audiotape, which the State played for the jury, was also hearsay and that none of the evidence was admissible as fresh complaint because the defense never challenged the victim's credibility. The State contends that the testimony was admissible under the fresh complaint doctrine because it was used to rehabilitate the victim after the defense impeached her. The State also contends that any error was harmless because the jury could convict the appellant based upon the victim's testimony and the DNA evidence alone. We agree with the State that the evidence was admissible under the fresh complaint doctrine and that any error was harmless.

During Markita Watkins' testimony, she testified that she drove the victim's bus to school and that all of the children, except the victim, got off the bus. The victim told Watkins that she wanted to talk with her. The defense immediately objected, stating that it believed Watkins was about to give hearsay testimony. The State argued that the testimony was not hearsay, and the trial court overruled the defense's objection. Watkins then testified that the victim told her the appellant pulled off her clothes and "stuck his thing in me." At the conclusion of Watkins' direct testimony, the trial court asked the attorneys to approach the bench and stated the following:

> The reason that her testimony was admissible is it's a fresh complaint exception, and I do have to charge the jury they can consider it only for that purpose, that it is to - - hearsay statements made by the victim of a sexual assault are admissible as going to credibility of the victim, and to corroborate her testimony, and I'm going to instruct the jury that that's the only two things they can consider.

After cross-examination, the trial court told the jury that Watkins had given hearsay testimony but that "[h]earsay statements made by the victim of a sexual assault are admissible as going to the credibility of the victim, so you can consider it as far as the victim's credibility and to corroborate her testimony."

Anthony Armour testified that while he was driving the victim to her grandmother's house after the softball game, the victim began crying and "started telling me what happened." Armour stated that he drove the victim to JoAnn Hopkins' house and that the victim told Hopkins the appellant had raped her. JoAnn Hopkins did not testify as to anything Anthony Armour or the victim said, but the State played for the jury an audiotape of her 911 call to the police. During the call, Hopkins told the 911 dispatcher that "my little niece say my nephew raped her." Hopkins also said on the tape that the appellant "came in [the victim's] room" and "raped her last night." Detective

Kimbrough testified that the victim told him that the appellant grabbed her by the neck, put his hand over her mouth, closed the door with his feet, took off her clothes, pulled down his pants, and raped her. The trial transcript reflects that the defense objected to Armour's and Detective Kimbrough's testimony and to the playing of the 911 tape on hearsay grounds, but the trial court overruled the objections.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Generally, hearsay statements are inadmissible unless they fall under one of the recognized exceptions to the hearsay rule. Tenn. R. Evid. 802. Although not mentioned in the Tennessee Rules of Evidence, our supreme court has held that the fresh complaint doctrine allows a prosecutor to enter into evidence in the State's case-in-chief the fact of a victim's complaint of a sexual offense. State v. Kendricks, 891 S.W.2d 597, 603 (Tenn. 1994). In so holding, the court specifically rejected the previous rule set forth in Phillips v. State, 28 Tenn. 246 (1848), which permitted the introduction during the State's case-in-chief of both the fact of the complaint and the details of the crime. Kendricks, 891 S.W.2d at 603. The court concluded that any admission of the details of the complaint must be preceded by impeachment of the accuracy of the victim's direct testimony. Id. Our supreme court offered the following explanation in rejecting the broader Phillips rule:

> A very real danger lurks in prematurely admitting the details of the victim's complaint as evidence in the state's case-in-chief. The victim may be impeached on grounds other than the accuracy of his or her direct testimony. For example, if a victim were shown to have harbored a pre-complaint motive to falsely accuse the defendant of rape, the fact that the details of the victim's complaint are consistent with the in-court testimony would be irrelevant in rebuttal of the impeachment testimony. Thus, the Phillips rule clearly invites the risk that the jury would be allowed to hear an irrelevant repetition of the victim's testimony that could not be subjected to prompt cross-examination. This potential for prejudice threatens the defendant's right to a fair trial as guaranteed by the Fifth and Sixth Amendments to the United States Constitution and Article I, Section 9, of the Tennessee Constitution.

Id. In State v. Livingston, 907 S.W.2d 392, 394 (Tenn. 1995), the court eliminated the doctrine of fresh complaint when a child is the victim of sexual abuse. However, a "child" for the purposes of the fresh complaint doctrine is less than thirteen years old. See State v. Schaller, 975 S.W.2d 313, 321 (Tenn. Crim. App. 1997).

We agree with the appellant that the evidence at issue was hearsay. However, given that the victim was sixteen years old and complained to the witnesses about the rape relatively soon after the event, we agree with the trial court that the fresh complaint doctrine applied in this case. See Kendricks, 891 S.W.2d at 605-06 (stating that "while the complaint must be timely, it need not be

contemporaneous with the underlying event" and that timeliness "depends upon an assessment of all the facts and circumstances"). Therefore, the witnesses could testify that the victim complained to them about the rape. Moreover, although the appellant claims in his brief that he did not challenge the victim's credibility, our review of the trial transcript reveals that the appellant challenged the victim's credibility. For example, the victim admitted during cross-examination that she had testified at the preliminary hearing that the rape lasted thirty to forty minutes but testified at trial that the rape lasted five or ten minutes. Thus, the details of the crime were also admissible under the fresh complaint doctrine.

We note, however, that fresh complaint testimony is admissible as corroborative, not substantive, evidence. See id. at 606. After Markita Watkins testified, the trial court properly gave a limiting instruction as to the jury's being able to consider her hearsay testimony only to corroborate the victim's testimony. The trial court did not repeat this instruction after the State played the 911 tape for the jury or after Anthony Armour's or Detective Kimbrough's testimony. Nevertheless, any error in failing to repeat the limiting instruction was harmless in light of the victim's testimony and the DNA evidence. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

B. Pre-arrest Right to Remain Silent

Next, the appellant claims that the trial court erred by allowing the prosecutor to tell the jury during opening statements that the appellant refused to speak with Detective Kimbrough during his investigation and by allowing the State to question Detective Kimbrough about the appellant's refusing to come to the police department. He contends that the prosecutor's statements and Detective Kimbrough's testimony denied him the right to a fair trial because he had no duty to talk to the police under the Fifth Amendment to the United States Constitution. The State contends that its opening statement and Detective Kimbrough's testimony were proper. We agree with the State.

During opening statements, the prosecutor stated that Detective Kimbrough told the appellant over the telephone that he needed to speak with the appellant about a rape and that the appellant said, "I'm not coming in there to talk to you." The defense objected, arguing that the appellant's exercising his constitutional right not to speak with the detective should not be used against him. The trial court overruled the objection. The prosecutor then told the jury that the appellant refused to meet with Detective Kimbrough at the police department and that Detective Kimbrough had warrants issued for the appellant's arrest. During Detective Kimbrough's direct testimony, he stated that he spoke with the appellant over the telephone and told the appellant that he needed to talk with him about a rape. Detective Kimbrough testified that he waited two days for the appellant to come to the police department and then had warrants issued for the appellant's arrest.

The Fifth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution provide protection against compulsory self-incrimination. Our United States Supreme Court has held that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not,

therefore, use at trial the fact that [the appellant] stood mute or claimed his privilege in the face of accusation." Miranda v. Arizona, 384 U.S. 436, 468, 86 S. Ct. 1602, 1625 (1966).

However, an appellant's Fifth Amendment rights do not "come into play" prior to arrest. State v. Kennedy, 595 S.W.2d 836, 838 (Tenn. Crim. App. 1979); see also State v. Jimmy Alexander, No. 03C01-9404-CR-00159, 1995 WL 459116, at * 5 (Tenn. Crim. App. at Knoxville, Aug. 4, 1995) (citing Kennedy and stating that the "Fifth Amendment right against self-incrimination does not extend to pre-arrest silence"). An appellant's pre-arrest or pre-Miranda silence "does not infringe upon the same fundamental fairness concerns [because] '[s]uch silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty.'" State v. Calvin Grady Purvis, No. 02C01-9412-CC-00278, 1995 WL 555052, at *7 (Tenn. Crim. App. Sept. 20, 1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716 (1993)). In the instant case, the appellant had not been arrested or given Miranda warnings prior to his refusing to speak with Detective Kimbrough. Therefore, Detective Kimbrough's testifying that the appellant refused to speak with him during his investigation did not violate the appellant's constitutional rights, and the prosecutor's statements to the jury were not improper.

C. Jury Voir Dire

The appellant claims that the State improperly and deliberately tainted the jury panel by asking a prospective juror, who knew the victim and Markita Watkins, about his opinions of them. The State contends that the appellant has waived this issue by failing to make a contemporaneous objection, by failing to request a curative instruction, and by failing to request a mistrial. The State also contends that the appellant has failed to show that the jury consisted of any impartial jurors. We agree with the State that the appellant has waived this issue. In any event, the appellant is not entitled to relief because he has failed to demonstrate that the jury was prejudiced by the prospective juror's comments.

During jury voir dire, prospective juror High stated that he worked at the victim's high school and knew the victim and Markita Watkins very well. The State asked him if he had any opinions of the victim and Watkins, and High stated that he had "very high" opinions of them. He also stated that he had "trusted them for years" and that he would tend to believe their testimony. The defense did not object to these statements, but High was dismissed from the jury pool. Later, the defense referred to High's comments and asked, "Does anybody have a problem with that because they've heard something about the victim from one of your members of the jury panel, another juror? Is that a problem?" The record reflects that none of the remaining potential jurors responded affirmatively.

Initially, we agree with the State that the appellant has waived this issue for failing to make a contemporaneous objection or requesting a mistrial. See State v. Lockhart, 731 S.W.2d 548, 550 (Tenn. Crim. App. 1986) (stating that the defendant waived any issue regarding a prospective juror's prejudicial comment by failing to make a contemporaneous objection or requesting a mistrial), overruled on other grounds by State v. Rickman, 876 S.W.2d 824 (Tenn. 1994); see also Tenn. R. App. P. 36(a). In any event, the defense asked the remaining prospective jurors if they could be

impartial in light of High's statements, and none of the jurors indicated that they could not be fair and impartial. Nothing in the record indicates that the remaining prospective jurors were prejudiced by High's comments. See State v. Brown, 795 S.W.2d 689, 696 (Tenn. Crim. App. 1990). Therefore, the appellant is not entitled to relief.

D. Medical Records Testimony

The appellant claims that the trial court erred by allowing nurse Ardyce Rodolpho to testify about the victim's medical records from the Sexual Assault Crisis and Resource Center and from the victim's pediatrician. He contends that Rodolpho's testimony was not admissible under the business records exception to the hearsay rule because she was not the "keeper" of the records. The State contends that Rodolpho demonstrated she was properly qualified to testify about the records. We conclude that Rodolpho improperly testified about the victim's records from the pediatrician's office but that the appellant is not entitled to relief.

Rodolpho testified that she was a registered nurse, had worked for the Sexual Assault Crisis and Resource Center for seven years, and had performed more than one hundred fifty examinations on sexual assault victims at the Center. She testified that all of the nurses at the Center had received specialized training, and she testified in detail as to how evidence is collected for a rape kit. She also stated that registered nurse Kat King, who had been trained by the TBI to collect evidence for rape kits, had performed the victim's physical examination and had collected evidence for the victim's rape kit. At the time of trial, King had moved to California and was no longer working for the Center.

Rodolpho testified that an examining nurse completes the first step in a rape kit by filling out a forensic exam sheet, which consists of questions answered by the victim. Rodolpho said that she had reviewed the victim's medical and evidence records from the Center, and the defense objected to her testifying about those records because they were hearsay. The trial court overruled the objection, and Rodolpho testified about the results of Kat King's examination of the victim. According to the victim's medical evaluation form filled out by King, King found motile sperm in the victim and abrasions in the victim's vagina. The State introduced copies of the victim's records from the Center into evidence, and Rodolpho testified that the copies came from the Center's office, were true and exact copies of the originals, were kept in the normal course of business, and were within the Center's custody and control. Rodolpho also testified, over the appellant's objection, that she had reviewed the victim's pediatrician's April 16 medical records. According to those records, the victim complained to her pediatrician of nausea and tenderness from her belly button to her private area.

Tennessee Rule of Evidence 803(6) provides the following exception to the hearsay rule:

> Records of Regularly Conducted Activity. - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from

> information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used on this paragraph includes every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit.

In State v. Dean, 76 S.W.3d 352, 365 (Tenn. Crim. App. 2001), this court held that a forensic nurse examiner for a sexual assault center was qualified to testify about the victim's medical records from the center. In concluding that the witness was qualified to testify, this court noted the following regarding who is qualified to authenticate a business record:

> Rule 803(6) simply provides that the witness be the records "custodian or other qualified witness." Typically that witness will be in charge of maintaining records of the particular business, but other employees or officers or appropriately informed witnesses could be used as well. The key is that the witness have knowledge of the method of preparing and preserving the records. If no witness is available to testify, the records cannot be authenticated as business records, unless the parties stipulate to authentication.

Id. (quoting Neil P. Cohen et al., Tennessee Law of Evidence, § 8.11[11] (4th ed. 2000)). "On rare occasions, the witness may be someone other than an employee of the relevant business." Neil P. Cohen et al., Tennessee Law of Evidence, § 8.11[11] (5th ed. 2005)

As this court held in Dean, we conclude that Rodolpho's duties and experience as a nurse for the Center made her qualified her to testify about the victim's medical records from the Center. However, given that Rodolpho was not an employee of the victim's pediatrician and did not demonstrate any knowledge about how the victim's medical records from that office were prepared and preserved, we do not believe she was qualified to testify about those records. In any event, given the victim's testimony and the DNA evidence in this case, any error was harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

E. Ferguson Violation

The appellant claims that he was denied his right to a fair trial because the State failed to preserve Detective Kimbrough's investigative notes, which included the victim's statement to him on April 15. The State contends that the notes had no exculpatory value and, therefore, that it had no duty to preserve them. In addition, the State contends that the missing notes would not have

played a significant role at trial because Detective Kimbrough had the notes at the preliminary hearing, and the appellant had access to the information in the notes through the preliminary hearing transcript. We conclude that the appellant is not entitled to relief.

After the victim's direct testimony, the defense requested the victim's statement to Detective Kimbrough pursuant to Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007 (1957). The State told the trial court that it did not have Detective Kimbrough's investigative notes and that it had learned the previous Friday that the detective had lost the notes. In a jury out hearing, Detective Kimbrough testified that he interviewed the victim at the Sexual Assault Crisis and Resource Center and took notes during the interview. He stated that he had his notes at the preliminary hearing but that he could not find them for trial. He said that "I would normally keep them with, with my file . . . but . . . we moved, so . . . maybe they got misplaced or something." The trial court stated that it believed Detective Kimbrough was being truthful when he testified that the notes had been misplaced. The defense argued that the State had violated State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), and that it could not properly cross-examine the victim without the notes. It requested that the trial court dismiss the indictments, grant a mistrial, advise the jury to disregard the victim's testimony, or advise the jury to disregard any of Detective Kimbrough's testimony regarding the victim's statement to him about the rape. The trial court concluded that the appellant had a right to the notes and that

> assuming that the duty to preserve it was not met, then I have to consider in balancing it the degree of negligence involved, the significance of the destroyed evidence, the sufficiency of other evidence used at trial to support the conviction, and the DNA evidence is going to be what is controlling, so I think - - I see no merit at all in your position.

The trial court denied the appellant's requests for relief.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). As such, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

In Ferguson, our supreme court addressed the issue of when a defendant is entitled to relief when the State has lost or destroyed evidence that was alleged to have been exculpatory. The court explained that a reviewing court must first determine whether the State had a duty to preserve the lost or destroyed evidence. Ferguson, 2 S.W.3d at 917. Ordinarily, "the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. However,

> "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

Id. (quoting California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534 (1984) (footnote and citation omitted)).

If the proof demonstrates the existence of a duty to preserve the evidence and further shows that the State has failed in that duty, a court must proceed with a balancing analysis involving consideration of the following factors:

> 1. The degree of negligence involved;
>
> 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
>
> 3. The sufficiency of the other evidence used at trial to support the conviction.

Id. (footnote omitted). If the court's consideration of these factors reveals that a trial without the missing evidence would lack fundamental fairness, the court may consider several options. For example, the court may dismiss the charges or, alternatively, provide an appropriate jury instruction. Id.

Generally, a trial court's decision to admit or exclude evidence at trial will not be overturned absent an abuse of discretion. State v. James, 81 S.W.3d 751, 760 (Tenn. 2002); see also State v. William C. Tomlin, Jr., No. M2003-01746-CCA-R3-CD, 2004 WL 626704, at *3 (Tenn. Crim. App. at Nashville, Mar. 30, 2004), perm. to appeal denied, (Tenn. 2004). Further, "[t]he decision whether to dismiss an indictment lies within the discretion of the trial court." State v. Harris, 33 S.W.3d 767, 769 (Tenn. 2000). An abuse of discretion exists when the "'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999) (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

The State has the duty to preserve evidence that is exculpatory, or at the least material to the preparation to the appellant's defense. In this case, we believe the missing notes had potential exculpatory value to impeach the victim during cross-examination and could have been material to the preparation of the appellant's defense. Ferguson, 2 S.W.3d at 918. Therefore, the State had a

duty to preserve the evidence. Accordingly, we must now determine the consequences of the breach of that duty. Id. at 917.

First, the appellant concedes in his brief that the loss of the notes was attributable to simple negligence. Next, we must examine the "significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available." Id. Our review of the trial transcript demonstrates that the defense thoroughly cross-examined the victim about the rape and about her preliminary hearing testimony and was able to point out several inconsistencies in her trial and preliminary hearing testimony. Therefore, we do not believe the loss of the notes was particularly detrimental to the defense. Finally, the trial court concluded that the remaining evidence against the appellant, particularly the DNA evidence, sufficiently established his guilt. We agree and conclude that the trial court did not abuse its discretion by denying the appellant's request for relief under Ferguson.

F. Excessive Sentence

Finally, the appellant claims that his sentences are excessive because the trial court failed to apply five mitigating factors. The State contends that the trial court properly sentenced the appellant. We agree with the State.

No witnesses testified at the sentencing hearing, but the State introduced the appellant's presentence report into evidence. According to the report, the then thirty-five-year-old appellant had never been married, had six children ranging in ages from one to sixteen years old, and paid fifty dollars per week in child support for his oldest child. The appellant dropped out of school after the ninth grade and had not attempted to obtain his GED. The report shows that he worked as a rug cleaner for Southern Management Corporation for two years but was fired after being arrested for the current offenses. In the report, the appellant described his physical and mental health as good. He stated that he began drinking alcohol when he was twenty-five years old but that he was not intoxicated at the time of the offenses. According to the report, the appellant has prior felony convictions for criminally negligent homicide and robbery, two misdemeanor convictions for assault, and a misdemeanor conviction for disorderly conduct. The appellant gave a statement for the presentence report in which he said that the only way the victim could have gotten his semen was to have gone into his room and taken semen from a towel or condom he used during sexual intercourse with his girlfriend.

The defense requested that the trial court mitigate the appellant's sentences because the appellant (1) wanted to provide physical, emotional, and financial support for his children; (2) did not use a weapon during the commission of the offenses; (3) completed alcohol and drug classes while in jail; (4) maintained employment before his arrest; and (5) had community and family support. See Tenn. Code Ann. § 40-35-113(13). Given the appellant's two prior felony convictions, the trial court ruled that he should be sentenced as a Range II offender for the Class C felony incest conviction but had to be sentenced as a Range I offender for the Class B felony rape conviction. See Tenn. Code Ann. § 40-35-106(a)(1) (providing, in pertinent part, that a "multiple offender" is a

defendant who has received a "minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes"). The trial court applied enhancement factor (1), that the appellant "has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," to the appellant's rape sentence. See Tenn. Code Ann. § 40-35-114(1) (2005). It enhanced the appellant's rape sentence by two years but did not enhance the incest sentence, ordering that the appellant serve concurrent sentences of ten and six years, respectively.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

The appellant was convicted of a Class B and a Class C felony. At the time that he committed the offenses in question, the trial court was to begin at the presumptive minimum, then "enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35-210(e) (2003). The presumptive sentence for Class B and C felonies is the minimum sentence within the appropriate range. See Tenn. Code Ann. § 40-35-210(c) (2003). The appellant was sentenced as a Range I offender for the Class B felony rape conviction and as a Range II offender for the Class C felony incest conviction. Accordingly, the presumptive sentences were eight and six years, respectively. See Tenn. Code Ann. § 40-35-112(a)(2), (b)(3).

The appellant claims that the trial court erred by failing to apply the requested mitigating factors to his sentences. We disagree. The appellant has never been married, yet he has six minor children. At the time of the report, he paid fifty dollars per week for one child. The only employment the thirty-five-year-old appellant reported was a two-year job for a carpet cleaning company. Although he completed two alcohol/drug classes in jail and argues that he is entitled to mitigation for "his attempts at rehabilitation," he contends in the presentence report that the victim went into his bedroom and stole his semen from a used condom. See State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994) (defendant's failure to accept responsibility for his crime reflects poorly on his potential for rehabilitation). Several family members and friends wrote letters on the appellant's behalf. However, the trial transcript demonstrates that the appellant's family is divided, with some members supporting the victim and other members supporting the appellant. Finally, we do not believe that the appellant is entitled to the mitigation of his sentences simply because he did

not use a weapon during the rape of his niece. The appellant's ten- and eight-year sentences are appropriate in this case.

We note, however, that pursuant to Tennessee Code Annotated section 40-35-501(i)(1) and (2)(G), a defendant convicted of rape must serve one hundred percent of the sentence. In the instant case, the appellant's judgment of conviction for rape reflects that the trial court sentenced him as a standard offender with a release eligibility of thirty percent. The trial court did not mention the appellant's release eligibility status at the sentencing hearing. Accordingly, we remand the case for correction of the judgment of conviction for rape to reflect that the appellant is required to serve one hundred percent of the ten-year sentence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the appellant's convictions and the length of his sentences but remand the case to the trial court for entry of a corrected judgment as to the rape conviction.

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NORMA McGEE OGLE, JUDGE